(1) 95-1628

Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

Jack Lehtinen,

Petitioner

vs.

QUANTUM CHEMICAL CORPORATION

Respondent.

- -

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE SIXTH CIRCUIT

- -

Jack Lehtinen

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93 pp

QUESTIONS PRESENTED

I. Do citizens intend that the rights to proceed pro se be taken by a decision that rewards fraud, and if applied to everyone, would destroy the economy of the U.S. and society as we know it?

II. Did the lower court err when it took the right to a jury trial given by the seventh amendment to the U.S. Constitution and decided by summary judgment that apparent authority existed?

III. Did the lower court err when it took the right to due process given by the U.S. Constitution in Amendment XIV by deciding: (a) Corporations are bound by documents signed by anyone who falsely states he is the new owner and president; (b) Belief that Wilkinson signed the amendment with apparent authority given by Lehtinen/AEC is established by finding Respondent believed the false assertation that he was the new owner and Wilkinson signed the amendment as the new president; (c) The court grants summary judgment by disregarding all

evidence favorable to the non moving party, the testimony of the officers of a corporation, and relies upon its own inadmissable speculations as to the corporation thought; (d) When the evidence establishes the Petitioner was defrauded out of the right to terminate the agreement, due to material damage caused by a casualty, and when the fact the casualty took place is not disclosed, the court concludes that it is not a fraud on the part of the seller, but the failure to exercise the right, is proof of continued interest; (e) A document that identifies the terms under which a party will purchase, contigent upon $100,000. due on signing, and financial information on new investors, is binding, even though the contigencies were never met, and no signed copy was returned to the purported buyer; (f) The officer who signed the affidavit, the court relied upon, to move the case from Nevada to Kentucky testified that he had no idea if the named witnesses would testify or what their testimony would be.

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Petitioner, Lehtinen, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered November 16, 1995 affirming the taking of his earnest money by Summary Judgment and that on hearing the judgment be reversed.

JURISDICTION

The unpublished judgment of the Court of Appeals was entered November 16, 1995. Timely Motion for Rehearing was filed, and was denied on January 4, 1996. This Court has jurisdiction under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2: "* * * nor shall any State deprive any person of * * * property without due process of law. * * *"

Amendment VII, United States Constitution: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * *.

STATEMENT OF THE CASE

This suit is brought to recover a $100,000 earnest money deposit paid on a closed ethanol plant (A-1). The agreement of sale was signed on November 19, 1985 and the price was $8.5 Million. (A 3,5) The purchaser was Agri-Energy Company, ("AEC") an Illinois Corporation being formed that day. (A- 6) Lehtinen was its president, sole shareholder and director. (A- 6) The agreement required "the property will be in good working order"(A- 8) "The rider to the agreement of sale provided that the buyer may elect to terminate the transaction if the equipment is materially damaged by casualty prior to closing." (A- 38)

"It is undisputed that the plant was not in good working order - - after the freeze up in December of 1985." (A-38) Unquestionable AEC could have elected to terminate the agreement. (A38)

Respondent defrauded AEC by failing to disclose the fact the casualty had occured. (Joint Appendix ("J.A.") 152)

AEC suspected damages occurred in 1984 until it was informed by admission dated February 8, 1993, "Defendant denies a freeze occurred * * near the end of 1984, apparently a freeze did occur in December 1985." (JA 70)

Lehtinen's interest in purchasing terminated, when he refused to sign a counter offer letter that required the closing occur by May 16, 1986. (A- 17)

The court concluded that the earnest money should not be repaid, as Lehtinen/AEI was bound by the apparent authority of Edward Wilkinson, who signed as president of AEC, a purported amendment to accept the plant "as is". (A-44)

The court was bound to rely upon the evidence supplied by Wilkinson, president of AEI, who was to operate the plant. (A- 2)

Wilkinson's affidavit states "I never was an agent, employee, officer, stockholder or on the board of directors of (AEC)" and never informed anyone from (Respondent) that I was" (JA 148) I assembled a group of investors who

intended to purchase (AEC) from Jack Lehtinen and simultaneously purchase the subject property * * *."

"Walter J. Collins was informed by me of my plan to purchase * * * and knew that any offer I made was contigent upon obtaining funds from new investors" that "did not include Jack Lehtinen." I did not receive a copy of the amendment executed by (Respondent) (JA149)

Wilkinson testified that he was aware that AEC was not going to purchase on May 16, 1986

That in May 1986 he contacted Respondent's agent and was informed that anyone could now purchase the plant and Ashland and others were interested (JA 421,428)

Wilkinson was assured that his Louisville group of investors could purchase (JA-421). Wilkinson signed and delivered to Quantum, a proposed amendment that identified the terms under which his investor group would purchase, but the group collapsed, when one of the members was involved in a tragedy. (A-22)

The court established that "apparent authority" did not exist, as Lehtinen/AEC had no knowledge of, and did not explicitly ratify, an act that took place on July 8, 1986, when Respondent believed that the agency relationship, if any, between Lehtinen/AEC and Wilkinson, had terminated in May of 1986, when it stated: "The critical question is whether the amendment * * executed by Wilkinson, as the purported president of "(AEC)" on or about July 8, 1986 bound AEC * * *. (A-44)

"Wilkinson previously had called Van assche in late May and told him that Wilkinson had purchased Lehtinen's interest in AEC and that Wilkinson was putting together a group of investors, Lehtinen was totally unaware of these developments." (A-21) "Wilkinson represented * * * in May of 1986 that he had purchased Lehtinen's interest in AEC and was its new president." "* * * this representation apparently was false. (A 59) When questioned if he believed Wilkinsons assertations, Van assche answered, "What I have to do." (JA184)

The court correctly found that Howard Goode was the attorney for AEI (A- 3), but implied he was the secretary of AEC (A-6). The pages cited by the court in Lehtinen's deposition state: Answer: "He never was the secretary in my corporation."
A: "He never served as secretary of the corporation. In reviewing the corporation documents, Howard Goode, being a secretary would be contigent upon me making him a secretary, which I never did." (JA 289-291)
Goode never worked for, was paid by, or submitted any statement, or any invoice to Lehtinen or AEC. (JA 293)

This is a case of numerous fraudulent acts:

I. Quantum had in its possession a copy of the purported amendment signed by Wilkinson and sent by Federal Express on July 8, 1986. (JA 423, 430) When it was received on July 9, 1986, Van assche called Wilkinson, who testified:

Q: He let you know immediately that they

expected the second $100,000, isn't that correct? A: Yes, absolutely.

Van assche testified:

Q: But you called him on the 9th didn't you?

A: Right.

Q: And you asked for the $100,000?

A: Correct.

Q: And you also asked about the investors?

A: Right.

Q: But you wanted two things before that agreement would go forward, isn't that correct, you had two demands? The number one demand was that you needed the financial information and the number two demand was that it was contigent upon the $100,000 being paid . A: Correct. (JA 205,206)

A: "I never got full proof of finance availability * * * the reason why we never closed * * * was always because I continued to ask for proof of financing and never got it." (JA 208,209)

Wilkinson was never informed that the agreement was accepted and no signed copy was sent to Wilkinson, AEC or anyone.

(JA 424) (Admissions JA 170-172)

The court found, "The payment of the $100,000 due with the signing of the agreement * * * was never forthcoming," or, "the financial information on the investor group requested by Van assche * * . Neither of these items was provided." (A- 22,23)

Any contention that the purported amendment was accepted and bound AEC is, of record, fraudulent.

II. This case had nothing to do with agency, as the unsent copy of the purported amendment, bore the signature of General counsel and Secretary John Salisbury, who testified:

Q: * * Now, has Walter Collins ever indicated to you that Ed Wilkinson was, in fact, an agent for (AEC)?

A: To my recollection, I never discussed this with Walter Collins * * *. " " * * I don't recall any such conversation."

Q: * * You were his supervisor? A: Correct.

Q: But you have no evidence that you, or Quantum to the best of your knowledge, has any evidence whatsoever that Ed Wilkinson was an agent

for (AEC)? A: I have no knowledge of that at all * * *.

Q: Then in your lawsuit, * * When Quantum indicates that Ed Wilkinson, in fact was an agent for Quantum, you state, not to your knowledge? A: Correct.

Q: And * * * as general counsel for Quantum, you state you have no knowledge whatsoever * * *. A: I have no personal knowledge of it.

Q: And in reviewing the records, you find none? A: I have not reviewed the records. (JA 261,262)

III. Quantum intended to defraud anyone who purchased the closed plant. Van assche acknowledged that as a bookkeeper, he knew that anyone would be "doomed to failure", who purchased the plant, as their estimate was the price of gasoline would have to be $1.55 per gallon in order for the plant to be "economically viable" and the price was $1.27. (JA 208, 210).

The court found the plant sold in 1988 for $950,000. "The plant was extensively updated, but was shut down soon there

after." (A- 24)

IV. C. William Carmean, the attorney that replaced Collins in 1990 revealed their intent to defraud when, in reliance upon altered documents, he identified their defense as follows: "The belief of (Respondent) * * that they were dealing with one entity, Agri-Energy, which was the buyer, and no one made clear to them, at that time, that there were, in fact two companies with different interests and * * * different corporate existence. When shown the unaltered originals of those documents, from Respondents files, testified they would be mislead, "Only if they were blind." (JA 95-98)

Van assche repeatedly testified that all parties at Quantum were well aware of all facts concerning both corporations and who their presidents were.

Q: Quantum was well aware that Ed Wilkinson was the president of Agri-Energy Incorporated, a completely distinct company from "AEC", isn't that correct?

A: I think so (JA 195-200).

V. The case was moved from Nevada to Kentucky in reliance upon a fraudulent affidavit. When deposed, the affiant admitted that he did not know, concerning those parties, "what their testimony would be and if they would * * testify." (JA 124)

VI. The signing of the amendment on July 8, 1986 was irrelevant, as Quantum intended to defraud AEC in June of 1986, as the court found: "Van assche had drafted a letter on June 12, 1986 in which (Respondent) deemed the agreement to be terminated and all payments received * * * to be retained as liquidated damages." (A-20)

Jurisdiction was proper in the United States District Court pursuant to 28 U.S.C. §1332 in that it is a controversy between citizens of different states and the sum involved exceeds the sum of $50,000 exclusive of interest and costs.

Jurisdiction in the Court of Appeals was proper under 28 U.S.C. 1291 and 28 U.S.C. § 636 (a) (3).

REASONS FOR GRANTING THE WRIT

I would hope that this case exhibits the most flagrant disregard for fact and law this court will have the displeasure to consider.

The Court of Appeals has sanctioned a lower court decision that is far from the accepted and usual course of judicial proceedings and permitted a decision in conflict with all courts of appeal, the Supreme Court and all state courts.

Apparent authority is determined by a jury. Cavic v Grand Bahama Dev. Co. (Ca 11, FLA) 701 F2d 879.

There is nothing that permitted the court to grant summary judgment by disregarding all admissible evidence favorable to the non moving party, rely exclusively upon its own inadmissable speculation as to what a corporation thought, about irrelevant incidents, that took place prior to November 19, 1985, the date AEC was formed, and Respondents officers testified,

did not mislead them. In Morelock v N.C.R.Corp. 586 F2d 1096 (1978) the court stated: The trial court may neither weigh the evidence nor substitute its judgment for that of the jury. Rather the evidence must be viewed in the light most favorable to the party against whom the motion is made." In Matsushita Elec. Industrial Co. v Zenith Radio Corp., 475 US 574, 587 (1986) the court stated: "Purpose of summary judgment is to pierce the pleadings and to assess the proof . ."The evidence relied upon must be admissible."

AEC cannot be bound by a document, signed by a party who falsely states, he is the new president, as void, fraudulant, or illegal acts cannot be ratified. See General Finance Corp. v Fidelity & Cas. Co. of New York 439 F2d 981, 986 (1971)

The court found "Lehtinen was totally unaware" of the act, and it must be shown that the principal had knowledge of and acquisced to the act. Ferro Concrete Const Co. v United States 112 F2d 488, 491 (1940)

The court does not identify the position held that would enable an agent to sign his own name as president, or any act of the principal that induced it to act to its detriment, there is no evidence of inquiry into the actual authority of Wilkinson, and all are essential. Brownell v Tide Water Associated Oil Co. 121 F2d 239.

A party who seeks to charge a principal for the contract made by his agent must prove the agent's authority. Schutz v Jordan 11 S.Ct. 906, 907.

In Ferro Supra the court stated the rule: "Authority in an agent to carry out or perform a contract already made by his principal, does not include the authority to change the contract or to waive any of its provisions, especially where, as here, the provision is one which was intended for the benefit of the principal. Presumptively, an agent is employed to acquire interests, not to give them up."

You know you have no civil rights when

the court concludes "Given the undisputed apparent authority of Wilkinson and Goode, the court resolves this question as a matter of law. See Wolford v Scott Nichols Bus Co. 257 S.W. 2d 594 (Ky 1953). In Wolford the court found that the principal was not bound, stating: "The relationship must exist at the time and in respect to the thing causing the injury and at a time while the agent * * * is acting within the scope of his agency." "His truck was being operated * * * without his knowledge or consent. Obviously, the relationship of * * * principal and agent did not exist." "There was no ratification in this case * * * it is essential that the ratification be explicit."

The court here found: "Lehtinen was totally unaware of these developments." The act took place on July 8, 1986 and in May of 1986, Wilkinson was no longer believed to be an agent, but, the new owner.

In Kentucky, a writing not signed and returned by the seller will not support any action. Armstrong v Lyen 148 KY 59,145 S.W. 1120(1912)

In Kentucky-Pennsylvania Oil and Gas Corp. v Clark. 247 KY 438, 57 S.W. 2d 65 (1933) the court stated: "Apparent * * * agency rests upon estoppel, and, before a third person can envoke that plea, he must have suffered some injury * * * where the third person knew and relied upon the conduct of the principal. The appellees never suffered any hurt * * * for this contract remained executory, until it was repudiated * * * the parties were in no way affirmatively affected by reason of this informal offer and acceptance."

A pro se is intended to have civil rights, to include, the right to a jury. Parnel v Southall Realty 94 S.Ct. 1723 (1974).

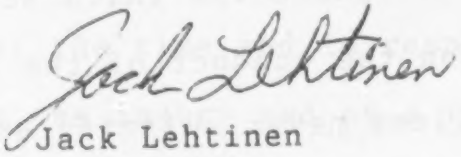
If this court grants the writ, the respondent, having no defense, should agree to settle immediately.

This pro se is entitled to what Americans are willing to fight and die for, equal justice.

CONCLUSION

This court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,



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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JACK LEHTINEN

PLAINTIFF

CIVIL ACTION NO. C92-0325-L(CG)

QUANTUM CHEMICAL CORPORATION

DEFENDANT

MEMORANDUM OPINION

The matter is before the Court on the motions of the parties for summary judgment in this action (Docket Nos. 55,60). The parties' dispute centers around an unsuccessful attempt to sell the Hill & Hill Distillery. Plaintiff brought the present suit to recover a $100,000. earnest money deposit that the defendant/seller is retaining as liquidated damages under the terms of the parties' 1985 Agreement of Sale. The material facts are as follows.

THE MATERIAL FACTS

The plaintiff in this action is Jack Lehtinen, a Minnesota dentist. Lehtinen left his dental practice in 1977 to speculate in real

estate (Lehtinen Depo., pp 5-6). For the most part he invested in residential property, i.e., small apartment buildings (Id.,p.7). Sometime in June of 1985, however, Lehtinen learned thr-ough one of his tenants, Roger Sweet, a vice president of Agri-Energy, Inc. ("AEI"), that the company was interested in acquiring the Hill & Hill Distillery, an ethanol plant in Louisville, Kentucky (Id.,p15). Sweet provided Lehtinen with a copy of a brochure about the plant and AEI's offer to purchase it.

AEI, a Minnesota corporation, hoped either to build or operate an existing ethanol produc-tion facility (Ed Wilkinson Depo.,pp 9-10, 26-27). From 1982, until its dissolution in 1987, AEI worked primarily as a consulting group in the ethanol industry (Id.,p.12). During this time, Ed Wilkinson became president of AEI. Wilkinson began working as a consultant in the ethanol business in 1978 or 1979 (Id.,p.8). His role at AEI was to handle the technical end of acquiring and managing an ethanol plant.

In early 1985, Wilkinson came to Louis-

ville with California clients to visit the Seagram's Distillery. While there, Wilkinson noticed the adjoining Hill & Hill Distillery, which he was told was for sale and had been closed for two or three years (Wilkinson,p.24). The distillery was owned by National Distillers and Chemical Corporation ("National"). National had converted the plant to ethanol production in 1980, but it had been dormant since June of 1981 (Pierre Van assche Depo.,p.18).

Wilkinson contacted AEI's attorney, Howard Good, who Wilkinson had met while working in the dairy industry. Wilkinson told Goode about the Hill & Hill property (Wilkinson, pp. 29-30). Goode contacted Rubloff, Inc., a Chicago brokerage firm handling the sale of the property, and spoke with broker John McGuinnis about arranging a visit to the property.

In the late spring of 1985, Wilkinson toured the plant with McGuinnis toured the plant with McGuinnis and Don Stone King, a National employee.[1] The tour took approximately one and

[1] National subsequently became Quantum Chemical Corporation, the defendant in this action.

one-half hours. Afterwards, Wilkinson felt that the plant had initial appeal (Wilkinson, p. 37). Goode was to make an offer to purchase the plant on behalf of AEI and an investor group (Id.,p.39) On May 31, 1985, Goode communicated an offer to McGuinnis to purchase the plant for $8.5 million dollars (Lehtinen, Exh. 1, p. 1).

Armed with a copy of this purchase offer, Lehtinen and his wife drove to Louisville to see the plant in June of 1985 (Lehtinen, pp.16, 18). Lehtinen spent several hours walking around outside the plant, but was not able to go inside during the one day he spent in Louisville (Id.,p.17). Lehtinen primarily was interested in the Hill & Hill Distillery for the real estate on which it was located, some sixty acres (Id51.,pp.18). Lehtinen had no prior experience in the ethanol manufacturing business and no prior dealings with Wilkinson, Goode, or National (Id.,pp.8,18,22). Lehtinen did meet Wilkinson once at the office of Roger Sweet sometime prior to the execution of the Agree-

nent of Sale on November 19, 1985 (Id.,p.20; Exh. 5). Lehtinen did not meet Goode until the signing of the agreement in New York on November 19, 1985 (Idg.,p.34).

In the interim, Wilkinson and Goode conducted all negotiations with National and its broker (Lehtinen, Exhs. 3-4). Lehtinen admits that he never spoke with National's attorney, Walter J. Collins, or its controller, Pierre Van assche. Lehtinen had no idea what was transpiring between AEI and National during this time (Id.,p. 47). Facts reveal that AEI made a public sale of stock in the fall of 1985, raising approximately $1 million dollars, which was placed in escrow. Lehtinen bought $250,000 worth of shares when AEI went public (Id.,p.43). Correspondence between McGuinnis and Van assche indicates that the money from the public offing would be used to finance the purchase of the plant (Id.,Exh.3). By November 14, 1985, Goode and Collins had finalized the terms of the agreement of sale (Id.,Exh.4).

Execution of the agreement of sale was arranged for November 19, 1985, at National's headquarters in New York City. Lehtinen arrived and met Goode for the first time (Lehtinen, p.34). Lehtinen testified that he was surprised to learn that the purchase documents were drafted to show the purchaser as being Agri-Energy Co. ("AEC"), an Illinois corporation (Id.,p.36). This was the first time that Lehtinen had ever heard of AEC. He had intended to buy the plant in his own name (Id., pp.37,52). Goode gave Lehtinen "a little paper," which indicated that Goode was forming AEC as an Illinois corporation with Lehtinen as president and sole director, and Goode as secretary (Id.,pp53-55). Lehtinen did not ask Goode why he had chosen a very similar name for the Illinois corporation to that of AEI, the Minnesota corporation (Id.,p.55)

Lehtinen maintains that he never saw the agreement of sale prior to that day in New York. However, he signed the agreement

immediately below the designation, "Agri Energy." Beneath his name, Lehtinen wrote, "Pres." (Lehtinen, Exh. 5,p.10). Lehtinen also signed a rider attached to the agreement. Again, he designated himself as being, "Pres." on a signature line directly below the heading, "Buyer: Agri-Energy Company." (Id.,p.11). Pierre Van assche, Controller for National, executed the agreement for the seller (id.).

The first page of the agreement designated the buyer as being Agri-Energy Company, an Illinois corporation with an office at 950 Skokie Boulevard, Northbrook, Illinois 60062. This address for AEC actually was the law office address for Howard Goode (Lehtinen,p.65). Lehtinen did not ask why Goode's address was used, nor did he know why Goode incorporated AEC as an Illinois corporation (Id.,p.67). Lehtinen insists that he intended to purchase the property himself, although he acknowledges that he never purchased property for $8.5 million dollars before (Id.,p.28). His intent was to make the down payment of $500,000 and rely upon in-

come from the ethanol plant to pay off the $8 million dollar balance due on the two notes (Id.,p.50).

Under the terms of the agreement, the purchase price was to be $8.5 million dollars, with $100,000 payable upon on the signing of the agreement, and another $400,000 due upon date of closing. The remaining balance was to be secured by two purchase money notes and mortgages (Lehtinen, Exh.5,p.2, ¶3). On execution of the agreement, Lehtinen tendered to National a $100,000 cashier's check containing his signature (Van assche Depo.,p,5).

Several of the provisions of the agreement are material to the parties' dispute. Paragraph 13 of the agreement provided that the buyer agrees he has examined the premises and is fully satisfied with the physical condition and did not rely upon any representation of the seller, "except that seller represents that the property will be in good working order." (Lehtinen, Exh.5,p.7, ¶13). The agreement also contained a provision in

¶14 for liquidated damages. The liquidated damage clause provided that if the buyer failed to perform under the agreement, the seller had the option to terminate the contract and retain all payments received as liquidated damages to cover its legal fees, costs and loss of time (Id., ¶14) . Paragraph 18 provided that any notice to the buyer would be sufficient if given in writing and delivered personally, or sent by certified mail, to Mr. Howard C. Goode, Agri-Energy Company, 950 Skokie Boulevard, Northbrook, Illinois 60602 (Id., ¶18). Finally, the agreement provided that its terms would be governed by and construed in accordance with Kentucky law (Id., ¶19). The parties were to close the sale within 100 days, by February 27, 1986.

After execution of the agreement, Wilkinson went to the Hill & Hill plant in early December to make a checklist of needed repairs and start-up procedures (Wilkinson, pp. 70-71). Melvin Hall, the head of plant security, let Wilkinson into the plant. Hall provided Wilkinson with the

use of an office at the plant (Id., pp.70,72).

According to Wilkinson, the "basic arrangement" between AEI and Lehtinen at the time was that Lehtinen would acquire the property, and that AEI would negotiate a joint venture agreement with him, or would purchase the ethanol production facility (Wilkinson,p.54). There was no written agreement with Lehtinen on what would happen after the property was purchased, however (Id). Wilkinson's memory as to who actually was buying the plant is "foggy." (Id., p. 74). He recalls that at the time the important thing was to get the property purchased so that AEI could operate the ethanol plant (Id., pp. 74-75).

In January of 1986, Howard Goode exchanged a series of letters with Pierre Van assche and Walter Collins on proposed amendments to the agreement of sale. Goode wrote Van assche on January 13, 1986, proposing an amendment to the agreement to reduce the $400,000 due at closing to $150,000. with a $250,000 letter of credit (Lehtinen, Exh.6). Goode attached a prop-

osed draft of the amendment which listed Agri-Energy Company as buyer. The following week, Walter Collins returned a draft of a revised amendment to Goode, incorporating the proposed change to subparagraph 3(b)(Id.,Exh.7,Att). The revised amendment also showed the buyer as Agri-Energy Company. Neither of these proposed amendments was executed by the parties. Instead, the parties' attention became focused on the condition of the plant.

Sometime in December, the plant experienced a loss of power during cold weather. The extreme cold resulted in a"freeze up," which damaged the plant's main air compressor, broke pipes in the heating and cooling system, and rendered the flow meters for the plant furnaces inoperable (Wilkinson,pp.136-146).

Wilkinson made several calls to representatives of National about the condition of the plant (Wilkinson, p.88). On January 20, 1986, Goode wrote Van assche that the plant had recently been vandalized and, as a result, broken glass from shattered windows had fallen into

plant equipment (Id.,Exh.3). Goode also noted that the plant roof was leaking (Id.). On February 19, 1986, Lehtinen, Wilkinson and three National engineers toured the plant (Van assche, Exh.4). Several days later, Wilkinson wrote Van assche on February 24, 1986, to bring to his attention "several major and some minor conditions at the Hill & Hill Distillery that will need attention." The letter related a series of problems, including the leaking roofs, broken glass, damaged air compressor, broken valves, stripped bolts, and missing equipment parts earlier mentioned. Wilkinson concluded by stating, "I think all of these items are things that can be easily corrected, but it will take time and a plan." This correspondence was soon followed by a separate letter from Goode to Van assche on February 26, 1986 (Lehtinen, Exh.9).

Goode began by stating that his letter was to confirm "that Edward Wilkinson on behalf of Agri-Energy Company, buyer, under the terms of the Agreement for Sale dated Novem-

BEST AVAIL

ember 19, 1985," notified National that the physical conditions of the plant and equipment did not conform to the good working order provision of §13(Lehtinen,Exh 9), Goode added that, "We are compelled to delay operations in closing until these matters are resolved. It is not our desire to needlessly nitpick. We trust these matters can be resolved amiably, and that the transaction can be completed." (Id). A copy of this letter was distributed to Lehtinen, who acknowledges that he did not protest its contents (Lehtinen,p. 107). Ultimately, the parties were unable to close by the scheduled closing date of February 27, 1986.

Instead, Collins wrote Goode to inform him that Van assche and Wilkinson had discussed the conditions outlines in the February 24, 1986, letter. National's engineers would review those allegations and prepare a report. Included with the letter was a proposed amendment to the agreement which would have extended the time for closing until March 6, 1986. This draft, in contrast to earlier proposed amend-

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ments, identified Agri-Energy Co., Inc., an Illinois corporation, as being the buyer (Lehtinen, Att.).

On March 5, 1986, Michael Parris, an engineer from National, visited the Hill & Hill plant to estimate the cost of repairing or replacing the items listed in Wilkinson's letter of February 24th (Van assche, Exh. 11). Parris concluded that it would cost $39,600 to repair damage to the boiler house, $11,100 to repair or replace equipment in the dry house, and $59,600 to repair the Ingersol-Rand air compressor. Walter Collins' handwritten telephone notes of March 12, 1986, indicate that he suggested to Wilkinson that $60,000 be deducted from the down payment set forth in the agreement of sale (Id.,Exh.12). The same notes relate that Collins believed it would take four to five weeks to repair the damage to the plant (Id.). Collins also wrote that he had called Goode and informed him of these matters, giving him the option of using the $60,000 himself to perform the needed repairs (Id.).

Negotiations between Goode, Wilkinson, Collins and Van assche continued throughout early April (Van assche, Exhs. 14-16). Collins' notes of April 7, 1986, indicate that Van assche spoke with Lehtinen that day (Id.,Exhs.15,16). Lehtinen agreed that National would not have to start spending $60,000 unless the parties could close, but monthly payments would begin in July, or from the date the plant was made operational (Id.,Exh.16). Collins' notes concerning this conversation also revealed that Lehtinen indicated that he would be interested in doing the repairs, "that is, Agri-Energy." Van assche had already spoken with Wilkinson on this issue and advised him that National's maintenance people would do the repairs for the purchaser after the closing (Id.,Exh.15). Collins' notes also reflect that the plant was not in good working order as of April 7, 1986 (Id.,p.32,Exh.15). In fact, Van assche did not dispute during his deposition that the plant was not in good working order on that date (Id.,p.34).

In mid-April, the parties scheduled a meeting for Louisville on April 29, 1986. On

that day, Lehtinen, Wilkinson, Goode, Van assche, Collins, McGuinnis, and two National engineers met at the plant (Van assche, Exh. 19). Collins' notes indicate that the group discussed giving Agri-Energy Company a credit for repairs to the plant, a reduction of the price of the plant to $6,750,000. with a $100,000 down payment, and monthly payments to begin three months after closing. Wilkinson, Goode and Lehtinen countered with an offer to purchase the plant for $5 million dollars, with $350,000 down, and $650,000 to be paid within one year, with the unpaid balance put on a 15-year note at 9% (Id.,Exh.19,p.3).

The day after the meetings, Van assche wrote Goode a letter on April 30, 1986. The letter reviewed the substance of the parties' meeting.Van assche indicates that Lehtinen's group proposed to amend the terms of the November 19, 1985, agreement of sale: using as a rationale the change in market conditions for ethanol due to the recent decline in oil prices." (Lehtinen, Exh.11). Van assche reject-

this proposal and, "[i]n a mood to keep this purchase and sale agreement alive," made a counterproposal to decrease the price to $6,750,000, give a $100,000 credit to cover all repairs on personal property, change the payment terms (including the $100,000 paid in November, 1985) to $250,000 at closing, $900,000 after 12 months, and the remaining $5 million dollar balance payable in monthly installments over a 15-year period at an interest rate of 10.5%, with the buyer to start making monthly payments of the promissory note 90 days after closing, and the closing to be held on or before May 16, 1986 (Id.).

Lehtinen's reaction to Van assche's letter of April 30, 1986, was not positive. Lehtinen did not want to buy the property on the terms that National proposed (Lehtinen,p.113). Lehtinen discussed the counteroffer with Goode and told him that he was not interested (Id.,p117). Lehtinen did not respond to National's counteroffer. Lehtinen reasons that he did not have to respond; the mere fact that he did not sign Van assche's letter of April 30,1986, was suff-

icient notice to National (Id.,p118). In fact Lehtinen admits that he never directly notified anyone at National that he was no longer interested in acquiring the plant. Lehtinen recalls that perhaps one year later in May of 1987, he telephoned Van assche or Collins to request the return of the $100,000 earnest money deposit (Id.,p.119). Lehtinen admits that he had no contact with either man in 1986.

Wilkinson was still attempting to purchase the plant in 1986, and if successful, was to repay Lehtinen the $100,000 deposit (Lehtinen, p.120). Lehtinen did not care, at that point, if Goode used Agri-Energy Company as a vehicle to buy the plant, as long as Lehtinen was paid in full (Id., p 124). Likewise, Lehtinen did not care what Wilkinson did with AEC as long as Lehtinen recovered his $100,000 (Id., p. 130). Who bought the plant was irrelevant to Lehtinen at that point (Id.,p.124)

After April 30, 1986, Lehtinen received no further correspondence concern-

ing the progress of negotiations. Wilkinson and Goode, however continued to actively negotiate for the purchase of the plant by Agri-Energy Company (Van assche, Exhs.36-42). Wilkinson was attempting to put together an investor group based in Louisville, Kentucky, to finance the purchase (Wilkinson, pp.96-98). According to Wilkinson, Goode and Van assche discussed the possibility of AEC buying the plant with an investor group from Louisville (Id.,p.99).

On June 10, 1986, Good sent Van assche a letter advising him that "Agri-Energy Company is prepared to proceed to acquire the Hill & Hill facility in Louisville, Kentucky, pursuant under (sic) the terms of the November 19, 1985, agreement as modified by your counterproposal in your letter of April 30, 1986. ."(Van assche, Exh.36,p.1). Goode then set forth a series of proposed amendments, including: paying $100,000 within 15 days of the execution of a "modification agreement," payment of an additional

$150,000 within 60 days thereafter, with interest to commence 90 days from the date of closing; payment of $450,000 in principal in one year, and an additional of $450,000 six months thereafter, along with other new terms.

Apparently, National was on the verge of terminating the November, 1985, agreement at this point. Van assche had drafted a letter on June 12, 1986, in which National deemed the agreement to be terminated and all payments received by National to be retained as liquidated damages (Van assche, Exh.38).This letter was never sent. Instead, Walter Collins wrote Howard Goode on June 23, 1986, with a revised amendment to the agreement of sale incorporating all of the revisions that both parties approved (Id.,Exh.39). Collins requested that the amendment be signed and returned to him along with a check for$100,000 (Id.). Goode called Collins three days later on June 26 to inform him that the amendment was in order, and that Wilkinson would sign the amend-

ment and forward the $100,000 (Id.,Exh.40).

Ultimately, Wilkinson did sign an amentment to agreement of sale, dated on June 30, 1986, and prepared by Goode (Wilkinson,p.100). Wilkinson signed the amendment of sale as president of Agri-Energy Company (Van assche, Exh.41,p.9). Wilkinson previously had called Van assche in late May, and told him that Wilkinson had purchased Lehtinen's interest in AEC, and that Wilkinson was putting together a group of investors (Id.,p.68). Lehtinen was totally unaware of these developments.

The amendment to the agreement (Van assche, Exh. 42) extended the closing date of the original agreement to August 28,1986. reduced the purchase price to $6,750,000; granted the buyer, AEC, a credit of $100,000 repairs to personal property, provided for payment of $100,000 by the buyer upon signing of the amendment, with $150,000 to be paid at closing, along with installment payments of $450,000 at 12 and 18 months; the remaining balance of $5,400,000 was to

be put on a purchase money note and mortgage (Id.,pp. 1-3). The amendment also deleted the good working order requirement of the original agreement and provided that the buyer shall make whatever repairs are necessary to place the equipment in good working order (Id.,p.4).

On July 8, 1986, Wilkinson sent a hand written letter to Walter Collins to confirm their telephone conversation of the same date, in which "Agri-Energy will except (sic)the terms and conditions of the amended agreement as of June 30, 1986, with one exception. The payment of $100,000 due with the signing of the agreement will be delayed for a short time." (Van assche, Exh.41).

Unfortunately, the $100,000 payment was never forthcoming. The Louisville investor group that Wilkinson hoped to assemble collapsed after one of its members was involved in an alcohol-related vehicular homicide (Wilkinson, pp. 106-107). On July 28, 1986, National's attorney, Walter Collins, sent an express letter to Goode demanding payment of $100,000

by August 1, 1986, or "National will consider the contract breached." (Van assche, Exh.43). In the same letter, Collins related that Ed Wilkinson had promised two things: (1) that he would deliver the financial information on the investor group requested by Van assche; and (2) deliver the $100,000 by July 15, 1986. Neither of these items was provided.

On August 5, 1986, Collins wrote Goode a final letter expressing the disappointment of National that Wilkinson was not likely to come up with the $100,000 additional deposit. Collins stated that he would inform the title insurance company involved that Goode would not be closing the transaction on behalf of Agri-Energy Company in accordance with the amended agreement (Van assche, Exh. 44,p.1.).

Wilkinson agrees that the transaction did not close as planned on August 28, 1986, through no fault of National (Wilkinson, p.106). The collapse of the investor gr-oup doomed the agreement. Wilkinson later that year attempted to put together another

investor group to purchase the plant through Consolidated Energy, a Minnesota corporation started by Joe French, the former chairman and CEO of AEI (Id.,p.122). National was not interested in dealing with this group.

Ultimately, the plant was purchased by a foreign citizen, Mr. Bakkala, in December of 1988, for approximately $950,000 (Wilkinson, p.162). The plant was extensively updated, but was shut down soon thereafter (Van assche, p.95).

On April 7, 1989, Lehtinen, through a Louisville attorney, contacted Walter Collins to make a written demand to National for the return of the $100,000 deposit (Lehtinen, p.141,Exh.16). This was the first written request by Lehtinen for the return of the earnest money deposit. Lehtinen later wrote Van assche in October of 1990, again insisting upon the return of the money (Id.,p.143).

On November 7, 1991, AEC assigned its interest in the deposit to Lehtinen (Lehtinen,p.146). Lehtinen concedes that AEC was not then an active corporation, but had been

administratively dissolved possibly as early as April 1, 1987 (Id.). The corporation was later reinstated. [2]

[2] During his deposition, Lehtinen was confronted with an earlier option agreement of September 26, 1987, that had been introduced into evidence in the federal criminal prosecution of Joe French, United States v. French, CR91-00089, W.D.Va. 1992. The option agreement of 1987 purports to assign the interest of Agri-Energy Company, "the buyer under the terms of agreement of sale with National Distillers dated November 19, 1985" to the J.L. Marina, Inc. corporation, a Michigan corporation, owned and controlled by Lehtinen The option agreement then purports to assign J.L.Marina's and AEC's rights, interest and title to the agreement to AEI, for which AEI, and/or Consolidated Energy, Inc. ("CEI"), a Nevada corporation, agree to pay $100,000 at 10% per annum, from November 19, 1985, until J.L.Marina exercises the option. Under the agreement, the option was to terminate on November 15, 1987, unless AEI or CEI submit evidence that the distillery was purchased by either corporation (Lehtinen, Exh.21, Gov't Exh.46). Although this document purports to assign the interest of AEC to J.L. Marina, Lehtinen denies that such an assignment ever occurred (Id.,p.154).

On the same date, Lehtinen filed the present suit against Quantum in the Federal District Court for Nevada (Docket No. 1). The pro se complaint seeks recovery of the $100,000 deposit, with interest, and punitive damages for fraud. On June 5, 1992, the Nevada District Court transferred the suit to this District Court, which assigned the case to the undersigned Magistrate Judge following the parties' written consent pursuant to 28 U. S.C. §636(c). The matter is now before the Court on cross motions for summary judgment (Docket Nos.55,60).

LEGAL ANALYSIS

The Standard of Review

The standard for summary judgment is well established in this Circuit Under Rule 56 (c), summary judgment is proper "if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Canderm Pharamacal, Ltd. v

Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). Only disputes over facts that might affect the outcome of the suit under controlling law will preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc. 477 U.S.242, 248 (1986). Factual disputes that are irrelevant or unnecessary will not be counted. Id; Boyd v. Ford Motor Co., 948 F,2d 283, 285 (6th Cir. 1991); Vollrath v. Georgia-Pacific Corp., 899 F.2d 533, 534-35 (6th Cir.), cert. den., 111 S.Ct. 345 (1990). Not only must the disputed facts be material, the dispute must also be "genuine." In other words, it must involve evidence on which a jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248.

The moving party bears the initial burden to show the district court that there is an absence of evidence to support the nonmoving party's case Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party need not support its motion with affidavits "negating the nonmoving party's claim; nor,

does the focus fall on the weight or the truth of the evidence. Id.; Anderson, 477 U.S. at 249. The critical question is whether the party bearing the burden of proof has presented a jury question as to each element of its case. Celotex Corp, 477 U.S. at 322; Stein v. National City Bank,942 F.2d 1062, 1064 (6th Cir. 1991).

Once the moving party has met its burden of production, the nonmoving party may not rest on its pleadings. Goins v. Clorox Co., 926 F.2d 559, 561 (6th Cir. 1991); Cloverdale Equip. Co. v. Simon Aerials,Inc., 869 F.2d 934 (6th Cir. 1989). The nonmoving party must, by deposition, answers to interrogations, and admissions on file, show specific facts that reveal a genuine issue for trial. Celotex Corp., 477 U.S. at 324, InterRoyal v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989). In other words, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Industrial Co., v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

It must submit significant probative evidence in support of its complaint to defeat a motion for summary judgment. Anderson, 477 U.S. at 249-250; Friedman v. United States, 927 F.2d 259, 262 (6th Cir. 1991). This burden, however, does not arise until the moving party has met its initial burden.

In many respects, this standard is similar to the standard applied when considering a motion for a directed verdict. Summary judgment should be granted when the evidence is such that it would require a directed verdict for the moving party. Anderson, 477 U.S. at 251. If the evidence viewed in the light most favorable to the nonmoving party is so one-sided that one party must prevail as a matter of law, then summary judgment should be granted. See Morelock v. NCR Corp., 586 F.2d 1096, 1104-1105 (6th Cir. 1987) (discussing the directed verdict standard), cert. den., 441 U.S. 906, (1979).

The Arguments of the Parties

The legal position of each party is well established. Lehtinen maintains that National

failed to put the ethanol plant in•good working order•prior to the proposed closing date of February 27, 1986,in violation of ¶13 of the agreement of sale(Van assche,Exh.I,p7) Lehtinen argues that the failure of National to put the plant in good working order by the date for closing constituted a material breach of the parties contract,which rendered the contract void and entitled Lehtinen to the return of the earnest money deposit. Lehtinen further argues that he did not agree to any extension of the original agreement of sale.His refusal to respond to the April 30, 1986,letter of Van assche,according to Lehtinen,put National on notice that he was no longer involved.Lehtinen insists that any representations by Wilkinson could not bind Lehtinen,since Wilkinson was not his agent. Lehtinen claims he had no control over Wilkinson, and that Wilkinson's representations to National are not sufficient to establish Wilkinson's apparent authority to bind Lehtinen. Accordingly, Lehtinen con-

cludes that the 1985 agreement was terminated, thereby entitling Lehtinen to the return of his earnest money deposit, irrespective of Wilkinson's ineffectual execution of the June 30,1986, amendment as the purported president of AEC.

National maintains that its retention of the earnest money deposit is entirely lawful, in accordance of the parties' original contract, as modified by the amendment of June 30, 1986. National claims that the buyer, Agri-Energy Company, through its agents, Goode and Wilkinson, never demanded performance or cancelled the agreement prior to the closing date set for February 27, 1986. Instead, they requested an extension of time, which was incorporated in the June 30,1986, amendment executed by AEC. National had no reason to believe that Goode and Wilkinson did not have full authority to enter into an agreement on behalf of the buyer, since both men had dealt exclusively with National throughout the entire course of the parties' negotiations, and Lehtinen ad-

mittedly made no effort to notify National of any limitation on either man's authority as agent to bind AEC.Because AEC undeniably defaulted on the parties' agreement, as amended, through no fault of the seller, National maintains that it is entitled to retain the $100,000 earnest money deposit pursuant to the liquidated damages provision of ¶14 of the agreement of sale (Van assche, Exh.1,p7).

Conclusions of Law

The first question which must be resolved is what law governs the resolution of this dispute. The parties tacitly appear to agree that Kentucky law is controlling. The Court agrees. The agreement of sale provides at ¶19 that the agreement shall be governed in accordance with the laws of the Commonwealth of Kentucky (Van assche, Exh. 1, p.9). The general rule in Kentucky is that parties to a contract can stipulate that the contract will be controlled by the law of a particular state, so long as a vital element of that contract is associated with a partic-

ular state, and the transaction is entered into in good faith. Consolidated Jewelers, Inc. v. Standard Financial Corp., 325 F.2d 31 (6th Cir. 1963). The circumstances of this action satisfy these requirements. Accordingly, the Court looks to the Kentucky law of contracts, agency and fraud, to determine the outcome of the parties' cross motions for summary judgment. The substantive law of Kentucky will determine what facts are material, and whether those material facts, if not genuinely disputed, entitle either party to judgment as a matter of law.

The court begins with the legal issues relating to the agreement of sale executed on November 19, 1985 (Van assche, Exh. 1). The agreement quite clearly satisfies the requisites for a valid and enforceable contract under Kentucky law. See gen. Watkins v Dept. of Highways. Comm. of Kt., 290 S.W. 2d 28 (Ky. 1956) (defining "contract"). Neither party now

argues that the original agreement was improperly executed, lacked adequate consideration or validity of assent See gen. Cuppy v. Gen. Accident Fire & Life Assurance Corp., 378S.W. 2d 629 (Ky. 1964) (discussed by the Court. The first question is a rather straightforward one-who is the buyer under the agreement? Lehtinen now maintains that he attempted to purchase the distillery for himself, rather than as mere president of AEC. The second, and more complex, question is whether the agreement of sale terminated or became otherwise unenforceable, on February 27, 1986, due to the inability of National to put the plant in good working order as required by of the agreement (Van assche, Exh.1,p.7 ¶13). Lehtinen's position is that the 1985 agreement of sale expired automatically on February 27, 1986, when it was clear to all parties that the plant could not be made operable by the proposed closing date (Id.,p.5 ¶9).

The first question is really one of

capacity. The Court must determine whether Lehtinen, in his individual capacity, attempted to purchase the plant, as he now maintains in his deposition (Lehtinen, pp. 36-37). The undisputed facts overwhelmingly refute this claim by the plaintiff. Lehtinen does not, and cannot, deny that he signed both the agreement of sale and the accompanying rider as president of Agri-Energy Company (Van assche, Exh.1, pp. 10,15). The agreement of sale on its face plainly refers to Agri-Energy Company, an Illinois corporation, as the "Buyer." (Id., p. 1).

The subsequent correspondence from Wilkinson and Goode to National's representatives also repeatedly refers to "Agri-Energy Company" as being the buyer (Van assche, Exh.6). The proposed amendment to the agreement of sale offered by Goode on January 13, 1986, identifies Agri-Energy Company as the buyer of the plant (Lehtinen, Exh.6). The revised amendment to the agreement of sale proposed by Walter Collins on January 22, 1986, also refers to Agri-Energy Company as the buyer

(Lehtinen, Exh. 7, Att.,p.4). Further, the cover letter of November 14, 1985, from Walter Collins to Goode that accompanied the final draft of the agreement of sale, specifically refers to the agreement of sale between National and Agri-Energy Company (Id., Exh.4). Finally, even Lehtinen, in his "Statement of Case and Request for Elimination of Frivolous Defenses" refers to Agri-Energy Co., an Illinois corporation that agreed to purchase from defendant an ethanol producing plant in Louisville, Kentucky." (Vol.II, left side of file).

Under Kentucky law, Lehtinen was a representative of AEC. The definition of "representative," found at K.R.S. 355.1-201, includes an officer of a corporation or association. By signing as president of AEC, Lehtinen had signed as an authorized representative, who bound his corporate principal as buyer. See K R.S. 355.3-403(1); Nat'l. Deposit Bank v. Ohio Oil Co.,62 S.W.2d 1048 (Ky. 1933) (agent who signed check with the designation "agents distributing account" sub-

jected corporate principal to liability). Accordingly, on this question, the undisputed material facts, and Kentucky law, compel but one conclusion-that Agri-Energy Company, and not Jack Lehtinen, was the buyer under the 1985 agreement. The fact that Lehtinen advanced the $100,000 earnest money deposit does not alter the capacity in which he signed the agreement, as president for AEC. Cf. Perry v. Ernest R. Hamilton Associates, 485 S.W. 2d 505 (Ky. 1972) (accountant who failed to disclose the corporate ownership of property, and represented himself as being owner, was personally liable for services rendered by engineering firm).

Having determined that AEC, as a matter of law, was the buyer under the 1985 agreement, the Court turns to the issue of the possible termination of that agreement. Again, Lehtinen's position is that the agreement automatically ended on February 27, 1986, when National could not satisfy the good working order provision of the agree-

ment on the proposed date for closing. It is undisputed that the plant was not in good working order on February 27, 1986. Van assche admits this in his deposition (Van assche,Exhs. 7-9,11). Indeed, the condition of the plant, as of the date of proposed closing, was such that National's own engineers estimated that $100,000 worth of repairs were required to make the plant operational after the "freeze up" in December of 1985 (Id, Exh.11).

Unquestionably, AEC could have elected to terminate the agreement on February 27, 1986, had it desired to do so. The language of the rider to the agreement of sale provides at ¶2 that the buyer may elect to terminate the transaction if the equipment on the subject real estate is materially damaged by casualty prior to closing (Van assche, Exh.1,p.14). Such express termination provisions are enforceable in Kentucky. See Samuel T. Isaac & Assoc. Inc. v. Fed. Nat'l Mortgage Assoc., 647S.W.2d 495 (Ky.App 1982);Businessmen's Assuran-

ce Co. of America v. Eades, 161S.W. 2d 920 (Ky. 1942).

This did not happen, AEC did not exercise its right to terminate the contract. No written notice was delivered by Wilkinson, Goode or Lehtinen to the designated representative of the seller, Mr. Robert L. Hampton, as required by ¶18) of the agreement of sale (Van assche, Exh. 1, p.9). Instead, AEC, through its representatives, consciously elected to forego its right to terminate the contract, as the February 26, 1986, letter of Howard Goode indicates: We are compelled to delay operations and closing until these matters (the repairs) are resolved. It is not our desire to needlessly nitpick. We trust these matters can be resolved amiably and that the transaction can be completed. (Lehtinen, Exh.9).

A copy of this letter was provided to Lehtinen, who did not protest or otherwise attempt to exercise AEC's right to terminate. A right to terminate a contract is no different than any other contractual rights;

it may be waived by the expressed agreement of the parties, or by their conduct. See gen. 17A AmJur.2d, Contracts, § 559, p. 572 (Lawyers Coop 1991). This general rule is merely an extension of the broader principle that the power of parties to a pre-existing contract to modify or rescind the contract is co-extensive with the power to iniate the contract in the first instance See Wilson v. Adath Isreal Charitable & Educational Assoc. Agent 89S.W. 2d 318 (Ky. 1936); Vinaird v. Bodkin Adm'x.72 S.W. 2d 707 (Ky,1934). In fact, the law of Kentucky suggests that a contract may be changed with respect to the time of performance with less formality than is required to enter into a new contract. Hannon v. Bodkin's Adm'x., 86 S.W. 2d 547 (Ky. 1975)

The undisputed facts show quite clearly that the parties exercised their right to extend the time for performance of the 1985 agreement. The February 26th letter of Howard Goode speaks of resolving the matter amiably and adds that, "the transaction can be com-

pleteed." (Van assche, Exh. 6). The March telephone notes of Van assche and Collins reveal that both men continued to speak with Wilkinson and Goode to resolve the issue of plant repairs (Id.,Exhs. 7-10). During this time, Van assche had the plant inspected by National employee, Michael J. Perris, who prepared a detailed report on the nature of the damage and the cost of repair (Id., Exh.11). Based on this report, National offered to reduce the down payment on the property by $60,000 (Id.,Exhs. 12-15). Accordingly, the undisputed facts reveal that the parties continued to negotiate about the scope and cost of repairs through March and into mid-April of 1986 (Id., Exhs. 16-18). There simply is no proof whatsoever that any representative of AEC ever attempted to exercise the buyer's right to terminate the contract.

Lehtinen argues that the contract terminated by operation of law due to National's breach of the good working order provision. Lehtinen claims that any negotiations after

February 27, 1986, constituted an effort to reach an entirely separate agreement. The Magistrate judge cannot accept this reasoning. Contracts made between competent persons are not to be set aside lightly. Spratt v. Carroll, 399 S.W. 2d 291 (Ky.1966); Zeitz v. Foley, 264 S.W. 2d 267 (Ky. 1954). Generally, the mere failure of a party to perform his part of a contract does not per se automatically rescind it. The aggrieved party must manifest an intent to rescind by clear and unambiguous notice that conveys an unquestionable purpose to insist on cancellation. See gen. 17A Am. Jur. 2d, Contracts, s 584, p.595-596 (Lawyers co-op 1991). Simply put, rescission is a right which a party to a contract may have where a material breach by the other party has occurred. See C.C. Leonard Lumber Co. v. Reed, 236 S.W. 2d 961 (Ky. 1951); Hill v. Park, 627 S.W. 2d 36 (Ky. App. 1981); Evergreen Land Co. v. Gatty, 554 S.W. 2d 862 (Ky. App. 1977). Rescission, however, is a right which must be clearly claimed and exercised to be effective.

The undisputed material facts plainly reveal that none of AEC's representatives made any attempt to assert the right of termination found in the rider to the 1985 agreement. All of the facts point to just the opposite conclusion-that the parties extended the time for performance, while attempting to re-negotiate the terms of the agreement in niew of the necessity for repairs to the plant. The parties' correspondence and conduct convinces the Court that the parties' desire to continue forward with the 1985 agreement is indisputable.

Both Lehtinen and Wilkinson conceded that neither of them expressed any decision to National that AEC was abandoning the 1985 agreement (Lehtinen, pp. 115, 118; Wilkinson, p.94). As late as April 7, 1986, Van assche was speaking with Lehtinen about performing repairs to the plant and the cost of such repairs (Van assche, Exh. 15). Accordingly, there are no genuine issues of material fact; the 1985 agreement did not terminate on February 27,1987,

by operation of law or by the request of AEC.

This brings us to the next set of issues. The critical question is whether the amendment to the agreement of sale executed by Edward J. Wilkinson, as the purported president of Agri-Energy Company, on or about July 8, 1986, bound AEC to the terms of the amended agreement of sale, including the liquidated damage provision on which National now relies to retain $100,000 earnest money deposit. Lehtinen maintains that his failure to respond to the April 30, 1986, letter of Pierre Van assche to Howard Goode (Lehtinen, Exh. 11) put National on notice that he was no longer interested in further negotiations to acquire the plant. Further, he argues that Wilkinson was not his agent, or an agent of AEC, with authority to execute the amendment to the agreement of sale.

The facts are undisputed that Wilkinson did sign the agreement of sale, as president for AEC, and returned the agreement to National, along with a handwritten letter on July 8, 1986 (Wilkinson, p.100; Van assche, Exhs.41-42).

Wilkinson's execution of the amended agreement occurred almost exactly one month after Goode wrote Van assche on June 10, 1986, that "Agri--Energy Co. is prepared to proceed to acquire the Hill & Hill facility in Louisville, Kentucky, pursuant under (sic) the terms of the November 19, 1985, agreement as modified by your counter-proposal in your letter of April 30, 1986." (Van assche, Exh 37). Van assche recalls that Wilkinson called him in late May and told him that Wilkinson had bought our Lehtinen's interest, and that Wilkinson was putting together a group of investors (Id.,p.67). Wilkinson confirms these representations in his deposition testimony.

During June of 1986, Goode and Van assche or Collins engaged in ongoing discussions about a new investor group from Louisville buying the plant (Wilkinson, pp. 97-99,102, 106-107). Wilkinson agrees that he does not recall ever having told anyone at National that AEC was no longer the buyer (Id.,p.114). Further, Lehtinen had no contact with AEC after April 30, 1986, until

several years later (Lehtinen, p.118). Lehtinen admits that he never contacted anyone to protest that Wilkinson was not a representative of the buyer (Id.,p.115). Indeed, Lehtinen testified that "if(Goode) wanted to use that (AEC) as a vehicle to buy it (the plant), as long as they paid me in full, I have no problem with that." (Id.p.124).As long as Wilkinson paid Lehtinen, Lehtinen did not care what Wilkinson did with AEC (Id.,p. 130).

These undisputed material facts raise several legal issues. Primarily, the questions center on concepts of apparent agency. More specifically, the critical question is whether Wilkinson possessed apparent authority as the purported president of AEC to execute the 1986 amendment. If he did, then the terms of the amendment, which expressly incorporates the 1985 agreement, are binding. If so, National would be justified in retaining the $100,000 earnest money deposit, since the uncontested facts are that the additional monies required to close were never

obtained by the buyer prior to the new August 28, 1986, closing date (Van assche, Exhs.43-44).

Kentucky law provides that National must bear the burden of proving the existence of Wilkinson's apparent agency. In re Beaver Dam Grain, Inc. 43 B.R. 283 (Bkrtcy. Ky. 1984); Cumnock-Reed Company v. Smith, 135 S.W. 2d 887 (Ky. 1940). Agency may be shown through the relationship of the principal and agent, directly or indirectly, or by any circumstances that have a tendency to establish agency. Wedding v. Duncan, 220 S.W. 2d 564 (Ky.1949). Custom, business usage, or course of dealing also may be circumstantial evidence sufficient to establish an agency relationship , Peoples Nat'l Bank v. Citizen Saving Bank of Paducah, 38S.W. 2.d 959 (Ky. 1931).

The basic definition of apparent authority has been stated by Kentucky many times. An apparent agent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces persons to believe to be his agent, although he has not either ex-

pressly or by implication conferred authority upon him. Ohio Oil Co. v. Smith-Haggard Lumbar Company, 156 S.W. 2d 111 (Ky.1941); Middleton v. Francis, 77 S.W. 2d 425 (Ky. 1935). This apparent authority may be created by a principal by his omissions as well as his commissions, and such authority will be implied where a principal passively permits the agent to appear to a third person to have the authority to act on his behalf. See gen 3 Am Jur 2d, Agency §§ 79, p. 54 (Lawyers Co-op 1991). When an agent acts within the scope of his apparent authority, the principal will be bound although the agent's authority is actually limited so long as the person dealing with the agent is ignorant of that limitation. Tenn. Gas & Transmission Company v. Cooke, 20(S.W. 2d 491 (Ky. 1948); Mill Street Church of Christ v. Hogan, 785 S.W. 2d 263 (Ky. App.199(

When a principal permits an individual t(occupy a position of authority of a particula kind, anyone who deals with that individual i that position is judtified in inferring that

he possesses such authority. Union Central Life Ins. V. Glasscock, 110 S.W. 2d 681 (Ky. 1938). In other words, when considering the question of apparent agency, Kentucky courts hold that the public has the right to conclude that a corporation has given an individual the power and authority which naturally and properly belong to the character in which the other person is held out, and may rely on his having such authority as is suggested by the ordinary habits and experiences of mankind. American Nat'l Red Cross, 151 S.W. 2d at 445. See also Savannah Sugar Refinery v. R.C. Canada Dry Bottling Company, 593 S.W. 2d 880 (Ky. App. 1979) (principal must affirmatively have held agent out to the public as possessing sufficient authority to modify a contract, or must have voluntarily permitted the agent to act as if he had authority).

A review of the parties' course of conduct and dealing repeatedly underscores the apparent authority of Goode and Wilkinson to speak for AEC at will concerning the negotiations and

terms of the parties' agreements. Lehtinen had very little, if any, direct involvement in the negotiation process. Lehtinen had not met, or spoken with, Collins or Van assche prior to signing the agreement on November 19, 1985 (Lehtinen, pp. 39, 56). All communications prior to that time were between Goode or Wilkinson and National. Lehtinen did not ever communicate in writing with National concerning the negotiations to the plant (Id., p. 53). In fact, his first written communication to National was not until October 5, 1990, when Lehtinen wrote Van assche demanding the return of the $100,000 deposit (Id.Exh 17). Lehtinen candidly testified during his deposition that he left it entirely to Goode and Wilkinson to speak to National representatives concerning the terms of the 1985 agreement of sale (Id, pp. 58-59). Prior to signing the agreement, Lehtinen had not told National or its representatives anything about himself (Id., p. 60). Further, he did not pro-

test the designation of Howard Goode as the recipient of notice for the buyer, AEC (Van assche, Exh 1, p. 9, 18; Lehtinen, pp. 67, 84). He also did not portest when Goode's office address was identified in the agreement as being the address for AEC.

After the agreement was executed, all written communication to National was sent by either Goode or Wilkinson. Lehtinen received copies of various correspondence until April 30, 1986 (Lehtinen, p. 98). His only contact was with Goode or Wilkinson (Id,. pp. 97-98). When problems developed with the condition of plant equipment, Wilkinson contacted National to protest conditions at the distillery (Id., Exh.8). Goode refers to Wilkinson in his letter of February 26, 1986, as having acted "on behalf of Agri-Energy Co., buyer, under the terms of an agreement of sale dated November 19, 1985." (Id., Exh. 9). Lehtinen admitted during his deposition that he received copies of these letters, but did not contact anyone to pro-

test that Wilkinson was not a representative of AEC (Id.,p.115). After receiving Van asschesʼs offer letter of April 30, 1986, Lehtinen took no action to notify National that he was not interested in buying the plant (Id., pp. 118, 120).

In fact, Lehtinen's attitute about the entire matter is well summarized in his deposition, wherein he states that Goode formed AEC at his expense, and "if he wanted to use that (AEC) as a vehicle to buy it (the Plant) as long as they pay me in full, I have no problems with that", (Lehtinen, p.124). Lehtinen felt the same way about Wilkinson's representations, as long as Wilkinson paid Lehtinen $100,000 earnest money deposit, Lehtinen did not care what Wilkinson did with AEC (Id., p. 130). Lehtinen even went so far as to concede during one deposition that Wilkinson was acting on his behalf, stating that, "I am not saying that he (Wilkinson) was not doing things that would not benefit me." (Van assche, p.64). Finally, in the factual alleg-

ations of his pro se complaint (Docket No. 1, p.3, 10), Lehtinen characterizes Wilkinson and Goode was being "his agents" when referring to Wilkinson's letter of February 24, 1986 (Id., Exh. 2).

All of these undisputed facts convince the Court that Lehtinen knowingly and repeatedly permitted Goode and Wilkinson to act on behalf of AEC with respect to negotiations with National for the purpose of the distill ery.. Lehtinen permitted both men to occupy positions of authority in dealing with National's representatives. See Tenn. Gas & Transmission Co., 206 S.W. 2d at 491) . Accordingly, National, and the public, had the right to conclude that AEC, and its president, Jack Lehtinen, had given Goode and Wilkinson the power to act on behalf of AEC concerning the purchase of the plant, American Nat'1. Red Cross, 151 S.W. 2d at 445. National was fully justified in accepting Goode's representation in his letter of June 10, 1986, that AEC was prepared to proceed to acquire the plant pur-

suant to the terms of the November 19, 1985, agreement (Lehtinen, Exh. 12). Certainly, Lehtinen did not make any affort to notify National that the apparent authority of either Goode or Wilkinson was limited in any fashion. Lehtinen simply sat back silently without notifying any National representative that he was no longer interested. Lehtinen's attitude about the whole matter of Goode's and Wilkinson's conduct concerning National seems to be that he did not case what Wilkinson and Goode did with AEC, so long as he got the $100,000 deposit back.

Certainly, the facts show that National had no inkling that Goode or Wilkinson had any limitation of authority which would have prevented them from modifying the 1985 agreement. Goode's and Wilkinson's continuing communication with National after April 30, 1986, was merely "business as usual" in view of the parties' past history of dealings. There are no genuine issues of material facts on this point. Both Goode and Wilkinson had apparent authority to negotiate for AEC for the purchase

of the Hill & Hill distillery because they were acting well within the scope of their apparent authority, AEC, and its sole share holder and president, were bound by Goode's and Wilkinson's actions in June and July of 1986. Ky. Macaroni Co. v. London & Provincial Marine & Gen. Ins. Co., 83 F.2d 126 (6th Cir.), cert. den., 299 U.S. 579 (1936); Nat'l Deposit Bank of Owensboro, 62 S.W. 2d at 1048. When AEC failed to come forward with the additional money required to close by August 28, 1986, National was fully entitled under the terms of the parties' 1985 agreement, as incorporated in the amendment of June, 1986, to retain the $100,000 deposit as liquidated damages.

Lehtinen challenges these conclusions in several respects. First, he argues that Wilkinson, by his own representations, could not create the apparent authority to act on behalf of AEC in the execution of the amendment to the agreement. The Court recognizes the principle that an agency cannot be est-

ablished solely by the declaration of the alleged agent. Cincinnati Ins. Co. v. Clary, 435 S.W. 2d 88 (Ky. 1968). Apparent authority must arise from the actions, or inactions, of the principal, in permitting the unknowing public to hold the reasonable belief that the agent has authority to act in a specified manner. See Savannah Sugar Refinery v. R.C. Canada Dry, 593, S.W. 2d 880 (Ky 1979).

As a legal concept, this principle is indisputable. The facts of this case,however, do not hang solely on the representations of Wilkinson or Goode to National. Lehtinen's repeated acquiescence in permitting both men to negotiate exclusively with National is the source of their apparent authority to prepare and enter into the June,1986,amendment to the agreement. In other words, Wilkinson did not simply step out of the shadows and proclaim himself to be a representative of AEC. Wilkinson,Goode and National had been negotiating for the purchase of the plant since May of 1985. Wilkinson, without protest by

Lehtinen, was referred to as a representative of AEC. Wilkinson maintained an office at the plant and was responsible for the technical details of making it operational.

Accordingly,the Court does not rely on Wilkinson's representations to National to establish his apparent authority,but on the significant history of dealing between the parties, and Lehtinen's apparent willingness to permit Goode and Wilkinson to do whatever they chose to do on behalf of AEC,so long as Lehtinen would eventually recover the $100,-000 deposit. The Court's opinion does not run afoul of the principle that apparent author-ity cannot be created by the unratified representations of the purported agent. Lehtinen also maintains that National was on notice that Wilkinson had no authority,apparent or otherwise, to execute the June 1986 amendment to the agreement. Lehtinen relies on two circumstances to establish notice to the seller. First,he maintains that his mere silence after April 30, 1986,was sufficient

to put National on notice. Second,he maintains that National knew that Wilkinson was president of AEI,a Minnesota corporation,and not AEC,a seperate Illinois corporation.

Kentucky law has long held that a principal will not be bound when the person dealing with the apparent agent knows, or has reason to know,that the agent is exceeding his authority.Gains v. Murphy, 239 S.W.2d 453 (Ky.1951); Aetna Ins. Co of Hartford,Conn. v. Emblen, 99 S.W.2d 710 (Ky.1937). Thus, a person who claims to rely on the apparent authority of an agent to modify a contract must pay heed to warnings and inconsistent circumstances. Savannah Sugar Refinery, 593 S.W.2d at 880.The court is hard pressed, given the undisputed facts,to find any inconsistent circumstances or warnings which a reasonable juror could believe that National ignored when dealing with Goode and Wilkinson after April 30, 1986.

As, noted, matters proceeded along the lines of business as usual, with Wilkinson and

Goode doing all of the negotiations on behalf of AEC for the purchase of the plant.Certainly nothing in their correspondence with National would constitute an inconsistent circumstance or warning which National should have heeded. Savannah SugarRefinery,supra. Indeed,the only different circumstance was that Wilkinson represented to National in May of 1986,that he had purchased Lehtinen's interest in AEC, and was its new president(Van assche,pp.67, 68).While this representation apparently was false,the circumstaces,as known to National at that time,would have seemed to confirm the representation. Lehtinen,by his own admission, was absolutely silent after the meeting of April 29,1986,whereas Wilkinson was actively involved in assembling a group of Louisville investors, a fact which National was aware of(Wilkinson,pp.97-99).No one ever notified National that AEC was no longer interested in going forward. Accordingly,none of these facts would lead National to believe that Wilkinson and Goode did not have the

authority to execute the amendment to the agreement of sale.The undisputed facts show that National had no reason to know that Wilkinson was acting outside the apparent scope of his authority when he signed the amendment to the agreement as president Of AEC. Certainly,the fact that Wikinson was president of AEI would not,of itself,preclude him from also being president of AEC. In today's business world,it is not at all uncommon for a given individual to be an officer in several corporations simultaneously. Lehtinen cites no case inwhich the mere status of an individual as president of a seperate corperation is sufficient to put one on notice that the same individual is possibly not president of another corp.

All of the circumstances at the time uniformly suggested that Wilkinson,in keeping with his past involvment,was acting on behalf of AEC. Given the undisputed apparent authority of Wilkinson and Goode,the Court resolves this question as a matter of

law. See Wolford v. Scott Nichols Bus Co. 257 S.W.2d 594 (Ky. 1953).The Court's resolution of this issue is in complete accord with the often stated principal of Kentucky law that when one of two parties must suffer aloss through the acts of an agent,the loss should fall on the one who,by his acts or inaction,authorized the agent to act.Tenn.Gas & Transmission Co.. 206 S W.2d at491;American Nat'l.Red Cross. 151 S.W.2d at 445. Simply put,justice requires that Lehtinen look to Wilkinson and Goode to recover any monies due him as the result of his want of ordinary care.which created the apparent authority of Wilkinson to bind AEC.

This brings us to the final issue in this case; Lehtinen's claim of fraud against National. Lehtinen maintaines that he is entitled to punativedamages because National knew at the time the 1985 agreement was executed that the plant had previously been damaged by a prior freeze-up.The record contains absolutely no proof of any intentional

misrepresentations by National concerning the condition of the plant. National made the plant available to Wilkinson for his inspection prior to the execution of the agreement, Wilkinson, Goode and Lehtinen had ample opportunity to conduct whatever inspections they chose to do. Wilkinson did examine the inside of the plant prior to November 19,1985. The record shcws no effort by National to conceal any defects in the plant.

A plaintiff who claims common law fraud must prove by clear and convincing proof that the seller has made a material misrepresentation, which the seller knew to be false,with the intent of inducing the buyer to act, and the buyer acted in reliance thereby suffering injury.Keck v Wacker, 413 F.Supp.1377,1383 (E.D.Ky.1976);Wahba v. Don Corlett Motors, Inc.,573 S. W 2d 357, 359 (Ky.App. 1978). Summary judgment may properly be granted against a plaintiff who fails to show clear and convincing evidence to establish all of the essential elements of common law fraud

White v. Turfway Park Racing Assoc, 909 F.2d 941, 946 (6th Cir. 1990); Street v. J.C. Bradford & Co.., 886 f.2d 1472, 1479 (6th Cir 1889).

Because Lehtinen has failed to establish by clear and convincing evidence, the essential elements of a claim of fraud, this claim must be dismissed with prejudice, also.

CONCLUSION

The Court has carefully reviewed all of the depositions, exhibits and pleadings of the parties. While this case is factually complex,the facts are not genuinely disputed. The undisputed facts,when analyzed according to Kentucky law,fully entitle the defendant to entry of summary judgment in its behalf. The Court shall order that the plaintiff's claims be dismissed with prejudice.

Date 7/21/94 /s/

C.CLEVELAND GAMBILL

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JACK LEHTINEN
PLAINTIFF

vs. CIVIL ACTION NO. C92-0325-L(CG)

QUANTUM CHEMICAL CORPORATION
DEFENDANT

JUDGMENT

The above-styled case having been trans ferred to the Magistrate Judge by the consent of the parties pursuant to 28 U.S.C. 636(c) and the Magistrate Judge having filed a seperate Memorandum Opinion;

IT IS ORDERED AND ADJUDJED that the defendant's motion for ssmmary judgment be,and it is,hereby GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's claims be,and they are hereby DISMISSED with prejudice.

This is a final and appealable Judgment,and there is no just cause for delay.

Date 7/21/94 C.CLEVELAND GAMBILL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JACK LEHTINEN
PLAINTIFF

vs. CIVIL ACTION NO. C92-0325-L(CG)

QUANTUM CHEMICAL CORPORATION
DEFENDANT

ORDER

The motion of the plaintiff to alter, amend or to vacate pursuant to Fed.R.Civ.P.59 (3) is DENIED.

Date 9/26/94 C.CLEVELAND GAMBILL

NO. 94-6420
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK LEHTINEN,
Plaintiff-Appellant,

V.

ON APPEAL FROM THE UNITED STAT
DISTRICT COURT FOR THE WESTER
DISTRICT OF KENTUCKY

QUANTUM CHEMICAL CORPORATION,
Defendant-Appellee .

BEFORE: MERRITT, Chief Judge, and DAUGHTREY and OAKES,* Circuit Judges.

PER CURIAM. In this diversity case the plaintiff-appellant, Jack Lehtinen, appeals t decision of the magistrate judge, sitting in place of the district judge by consent of t parties, granting summary judgment in favor the defendant.

Lehtinen initiated this action to roco the $ 100,000 in earnest money retained by defendant as liquidated damages under the t of the parties' 1985 sales agreement. On ap

*The Hon. James L. Oakes, United States Circu Judge for the United States Court Of Appea for the Second Circuit sitting by designat

BEST AVAILA

he argues that genuine issues of material fact exist in connection with each of his claims sufficient to warrant a trial on the merits.

The district court found to the contrary, in an exhaustive opinion that sets out the facts in detail and demonstrates conclusively why Kentuckey contract Law mandates summary judgment against the plaintiff on those facts.

This court reviews the grant of a motion for summary judgment de novo. American Casualty Co.V.F.D.I.C.,39F.3d 633,636 (6th Cir.1994)

Under the provisions of Fed.R.Federal Rules of Civil Procedure P.56(c),summary judgment is proper "if the pleadings,depositions,answers to interrogatories,and admissions on file,together with the affidavits,if any,show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of Law" However,"the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;the requirement is that there be no

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genuine issue of material fact. Anderson V. Liberty Lobby,477U.S. 242,247-48 (1986); American Casualty Co., 39 F.3d at 636.

Having carefully considered the record on appeal and the briefs of the parties,we are not persuaded that the district court erred in granting summary judgment.Because the reasons why judgment should be entered for the defend ant have been thoroughly articulated by the district court,the issuance of a full written opinion by this court would be duplicative and serve no usefull purpose.Accordingly,we AFFIRM the judgment of the district court upon the reasoning set out by that court in its memorandum opinion entered on July 24,1994.

Entered on November 16,1995.

No. 94-6420

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK LEHTINEN,

Plaintiff-Appellant,

V.

ORDER

QUANTUM CHEMICAL CORPORATION,

Defendant-Appellee,

BEFORE MERRITT, Chief Judge, DAUGHTREY, Circuit judge; and OAKES,*-Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this

*Hon. James L Oakes, Senior United States Circuit Judge For The Second Circuit, sitting by designation.

court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk(pe)

Entered January 4, 1966.

(2)

Supreme Court, U.S.
FILED
MAY 9 1996
CLERK

No. 95-1628

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JACK LEHTINEN,

Petitioner,

v.

QUANTUM CHEMICAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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8pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE SUMMARY JUDGMENT ENTERED BY THE DISTRICT COURT IN THIS BREACH OF CONTRACT ACTION WHERE THE COURTS BELOW HELD THAT UNDER THE UNDISPUTED FACTS, RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF KENTUCKY CONTRACT LAW.

LIST OF AFFILIATED CORPORATIONS

Quantum Chemical Corporation is a wholly owned subsidiary of Hanson, PLC. Hanson, PLC shares are publicly traded on the New York Stock Exchange as American Depository Receipts ("ADR"). Quantum Chemical Corporation has the following subsidiaries:

Quantum Chemical (Canada) Ltd., an Ontario corporation

CUE Insurance Limited, a Bermuda corporation

DR Insurance Company, a Kentucky corporation

NDCC International Inc., a St. Croix corporation

National Distillers & Chemical Corporation, a Delaware corporation (namesaver)

Quantum Acceptance Corporation, a Delaware corporation

H.W. Loud Co., a California corporation

USI Chemicals International, Inc., a Delaware corporation

Quantum Petrochemical Corporation, a UK corpo ration (90% QCC and 10% H.W. Loud Co.)

Quantum UK Limited, a UK corporation (25% USI Chemicals Int'l., Inc. and 75% Hanson Holdings (1) Limited)

Quantum Chemical Europe B.V., a Netherlands corporation (100% Quantum UK Limited)

Quantum Pipeline Company, an Illinois corpora tion

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JACK LEHTINEN ..... **Petitioner**

versus

QUANTUM CHEMICAL CORPORATION ... ***Respondent***

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

OPINIONS BELOW

Both lower court opinions are unpublished. The case number in the United States District Court for the Western District of Kentucky is C92-0325-L(CG). The case number in the United States Court of Appeals for the Sixth Circuit is 94-6420.

RULE INVOLVED

Rule 56, Federal Rules of Civil Procedure, provides in relevant part:

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings thereon.... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

Jurisdiction of the United States District Court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship. The plaintiff is a resident of the State of Nevada and the defendant is organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business at 11500 Northlake Drive, Cincinnati, Ohio.

Respondent adopts the Statement of Material Facts set forth by the Magistrate Judge in the Memorandum and Opinion entered July 21, 1994 and appended to the Petition.

REASONS FOR DENYING THE WRIT

Petitioner has presented no special or important reasons why the decision of the United States

Court of Appeals for the Sixth Circuit should be reviewed by this Court. This matter involves no more than the application of well-established law governing summary judgment practice in the federal courts to a contract dispute. The Petition for a Writ of Certiorari should be denied.

For the first time in this litigation, the Petitioner now attempts to couch the issues presented in this dispute as implicating rights granted him by the United States Constitution. He argues that, in his view, the lower court erred in granting summary judgment for the Respondent and the court of appeals erred in affirming that decision. Based simply upon his disagreement with the judgment, Petitioner argues that his constitutional rights to a trial by jury and to "due process" have been denied him. These issues were not raised or addressed before either court below.

There are no constitutional rights implicated in this matter. Instead, the only issue presented by the Petition is whether, under the standards set forth in Fed. R. Civ. P. 56, summary judgment on behalf of the Respondent was proper. Those standards have been fully developed in prior opinions of this Court. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986); Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986).

Indeed, Petitioner does not argue that either the District Court or the Court of Appeals utilized an improper standard in considering Respondent's motion for

summary judgment. He simply disagrees with the outcome. However, even assuming there was any merit to the Petitioner's argument, the correctness of a decision below is not meant to be the central focus of this Court's certiorari jurisdiction. "This court's review ... is discretionary and depends upon numerous factors other than the perceived correctness of the judgment we are asked to review." Ross v. Moffit, 417 U.S. 600, 616-17 (1974). Petitioner never raised any constitutional issues until he had exhausted all means of review below and only this Court remained.

The Magistrate Judge, who, by agreement, ruled upon the motions for summary judgment filed by both parties, "carefully reviewed all of the depositions, exhibits and pleadings of the parties," and ruled that "the undisputed facts, when analyzed according to Kentucky law, fully entitled the defendant to entry of summary judgment." [A-63]. The Court of Appeals for the Sixth Circuit affirmed in a per curiam opinion, finding that the Magistrate Judge, "in an exhaustive opinion," set out in detail and demonstrated conclusively why Kentucky contract law mandated summary judgment against the Petitioner [A-67]. There are no novel or important principles of law presented, and no issues of public interest implicated by those decisions. This is a contract dispute resolved by means of summary judgment. Accordingly, the exercise of this Court's certiorari jurisdiction is unwarranted.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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